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ASCERTAINING WHEN LOSS IS FIRST SUFFERED BY MISLEADING CONDUCT: THE RELEVANCE OF CONTINGENCIES, FUTURE PREDICTIONS AND CONCEALMENT?

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The seminal case in the context of limitation periods under the Trade Practices Act 1974 is the High Court decision in Wardley Australia Ltd v Western Australia (1992) 175 CLR 514. While the High Court concluded that a plaintiff should not be required to commence a claim until the existence of his or her loss is ascertained or ascertainable, the decision was limited to consideration of contingent loss under an indemnity. While it is accepted that the meaning of 'ascertainable loss' in the context of a pure contingency is clear, several decisions since Wardley have applied the principle of ascertainable loss to losses which are not readily identifiable as 'contingent'.[3] *This article critiques the concept of 'ascertainable loss' with the aim of determining whether the conceptual framework for ascertaining when the relevant limitation period commences should adopt 'contingent loss' as its core principle or a broader concept based on 'ascertainable loss.'*

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1. Introduction

> *To compel a plaintiff to institute proceedings before the existence of his or her loss is ascertained or ascertainable would be unjust.*[4]

This statement, by the majority of the High Court in *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 has provided the basis for applicants in various cases to resist time bar defences to claims under the *Trade Practices Act 1974* (Cth) ('the TPA') for contravention of, in particular, s 52 of the TPA.

The exact time at which loss is "ascertained" or "ascertainable" depends upon the nature of the interest infringed by the conduct and perhaps the nature of the interference occurring.[5] The application of this principle is anything but simple. In subsequent cases involving claims for relief by reason of a contravention of s 52 of the TPA, it has been argued that in relation to particular types of transactions, such as sales of business, mortgagee transactions and

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3 Particularly decisions such as *Henville v Walker* (2001) 206 CLR 459; *Bullock v O'Sullivan* [2003] QDC 155; (2004) Qld Lawyer Reps 198.
4 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 527.
5 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 527 affirming the approach of Gaudron J in *Hawkins v Clayton* (1988) 164 CLR 539, 600-601.

guarantees and indemnities, the loss was not reasonably ascertainable at the time the transaction was entered into. While contingent loss will not be “ascertainable” until the contingency occurs, the types of contingencies that will result in a postponement of commencement of the relevant limitation period requires further consideration. Further, to what extent does the principle have application to cases not involving contingent loss?

The purpose of this paper is to explore and critique the concept of ‘ascertainable’ loss with the aim of outlining the circumstances in which losses:

(a) can be characterised as ‘contingent’; or

(b) otherwise are incapable of being ascertained until some future time when events unfold to make the loss apparent.

2. Relevance of Actual Loss to the Limitation Period

An action under s 82(1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.[6] The change from a three (3) to a six (6) year limitation period took effect from 26 July 2001 and applies to conduct engaged in:

(a) prior to that date if the limitation period of three years had not expired when the amendment took effect; or

(b) after the commencement of the amended provision.[7]

It is accepted that a cause of action for damages under s 82(1) only arises once the applicant has suffered actual loss as a result of the conduct.[8] There is no provision in the TPA for an extension of the limitation period nor are parties entitled to rely upon the State *Limitation of Action Acts*[9] or equitable discretion[10] to extend the time for commencement of a claim. [11] Recent reforms of the TPA aimed at ensuring a fair and equitable distribution of liability for loss between parties to a claim based upon fault do not include reform of the limitation

6 Trade Practices Act 1974 (Cth), s 82(2).

7 *Trade Practices Amendment Act (No 1) 2001* (Cth), Schedule 1, Item 21. See *Samootin v Shea* (No 2) [2003] NSWSC 695, [10].

8 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514.

9 *Vink v Schering Pty Ltd* (1991) ATPR 41-064; *Keen Mar Corporation Pty Ltd v Labrador Park Shopping Centre Pty Ltd* (1988) ATPR 40-853; *New South Wales v McCloy Hutcherson Pty Ltd* (1993) 43 FCR 489, 502-505; *Jekos Holdings Pty Ltd v Australian Horticultural Finance Pty Ltd* [1994] 2 Qd R 515; *Chapman v Luminis Pty Ltd* (No 5) [2001] FCA 1106.

10 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514; *Keen Mar Corporation Pty Ltd v Labrador Park Shopping Centre Pty Ltd* (1988) ATPR 40-853, 49,196.

11 However, it may be possible to add a cause of action for damages under s 82 to an existing statement of claim out of time under the relevant State civil procedure legislation: *Trustee of the Property of Geoffrey Mahony v McElroy* [2003] QCA 208.

provisions of the TPA.[12] Consequently, the determination of when loss is actually sustained assumes great significance. Whilst there is a clear view within the authorities in relation to when loss is sustained if an asset of lesser value is purchased in reliance upon misleading conduct, the time when loss is sustained in a variety of other situations such as those identified above is not so clear cut.

3. General Principle - When is Actual Loss First sustained?

Whether loss has actually been sustained as a result of misleading conduct in connection with the acquisition of an asset will often depend upon expert evidence, usually provided by valuers. A court's determination of when loss is suffered by an applicant will usually involve a consideration of the interaction between the type of transaction entered into and the nature of the misleading conduct and the effect of these matters on the measure of loss claimed by the applicant.[13] This may mean that although the underlying transaction is the same, the nature of the misleading statement may affect the time at which the cause of action arises. For example, where a person purchases a house in reliance upon misleading statements concerning physical attributes of the property, the loss flowing from this may be demonstrated by proving that the property is not worth what the person paid. This would usually lead to the conclusion that the loss occurred at the time of acquisition of the property. Where, however, a person purchases a property on the basis of a misleading statement that the rental will be guaranteed at 8% for 10 years, valuation evidence may show that there was no diminution in the value of the property at the time of purchase. It is only when the rental guarantee is not honoured that an adverse risk, present in the terms of the contract at the time of acquisition, creates a measurable loss. It is clear from these examples that the date of contract or acquisition may not always provide an appropriate starting point for the limitation period under s 82(2) or an appropriate reference point for the related issue of the assessment of damages. Examination of the general principles utilised by the courts reveals two situations. First, the orthodox view that damage occurs and should be assessed at the date of entry into a contract; and secondly, the exception to that rule that loss does not occur even though a disadvantageous contract is entered into, until some event in the future occurs which makes the loss reasonable ascertainable.

3.1 Orthodox view – Loss occurs at the date of contract

A plaintiff may suffer economic loss or damage in a number of ways: by payment of money, by transfer of property, by diminution in the value of an asset or by the incurring of a liability.

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12 Trade Practices Act 1974 (Cth), ss 82(1B), 87CB-87CI introduced by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth).

13 *Murphy v Overton Investments* (2004) 204 ALR 26, [46], [55].

> Whether loss or damage is actually suffered when any of those events occurs depends on the value of the benefit, if any, acquired by the plaintiff by paying the money, transferring the property, having the value of the asset diminished or incurring the liability. If the plaintiff acquires no benefit, the loss or damage is suffered when the event occurs. At that time, the plaintiff's net worth is reduced. And that is so even if the quantification of that loss or damage is not then ascertainable.[14]

The view has been expressed that in the case of the purchase of an asset as a result of misleading conduct, the orthodox view is that damages (being the difference between the contract price and market value) will be assessed on the date of entry into the contract, because that is the date upon which the applicant becomes obliged to pay the purchase price on completion.[15] This principle applies on the assumption that valuation evidence reveals the asset is worth less on that day than the amount the applicant contracted to pay. Does it follow that this is the date upon which actual loss to the applicant occurs (and the limitation period commences to run)? While the orthodox view may provide a simple and easily applicable principle, it is suggested that an assessment of the time when actual loss is suffered should be assessed by reference to the evidence of value presented to the court, the substance of the misleading conduct, the type of loss which flowed from the particular conduct and the applicable measure of loss. On this basis it is possible that the date upon which loss actually occurs where an asset is purchased in reliance on misleading conduct may be the date of contract or the date of settlement. It is apparent from the authorities that the applicable measure of damages utilised by a court impacts significantly upon the court's determination of the time when loss or damage is first suffered. For example, if a buyer purchases a property in reliance on the misleading conduct of a real estate agent, the usual measure of loss, subject to appropriate evidence, will be the difference between the contract price and the market value of the property at the date of acquisition of the asset or investment. This can be contrasted with the acquisition of a business induced by misleading statements about the potential takings where the measure of loss may be the losses sustained in the operation of the business assessed after the date of acquisition and once it becomes apparent that loss has actually been suffered.

Whether the date of 'acquisition' is the date of contract or date of settlement depends, in the writers' view, upon the type and terms of the transaction. Despite the High Court's[16] recently stated preference for the date of contract, a variety of terminology is adopted in the

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14 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 536-537.
15 *HTW Valuers (Central Queensland) Pty Ltd v Astonland Pty Ltd* [2004] HCA 54, [15].
16 Ibid.

authorities, and with respect, the writers suggest that it is only once the aggrieved party has paid the contract price under the contract or is unconditionally bound to pay that it is possible to conclude that loss has actually, as opposed to prospectively, been suffered. For example, in the case of a sale and purchase of land the authorities suggest that loss is not suffered until the buyer pays the balance purchase money.[17] Until the purchase money is paid there is no actual loss, only prospective loss that may never be incurred.[18] Even though a deposit is paid the contract may be terminated, for example, for failure of a condition (and the deposit subsequently returned). The situation may be different in the case of other types of contracts. In the case of an insurance policy induced by a misleading statement loss may be sustained at the time of entry into the contract which usually coincides with the time the premium is paid.[19] Likewise, a mortgage or lease induced by the misleading statement of a professional concerning the obligations under the mortgage or lease, unless is it characterised as contingent loss, will usually be sustained at the time of entry into the contract.[20]

In the writers' view, whether loss and damage is first suffered when an applicant enters or completes a contract will depend upon the time at which the applicant becomes bound to pay the contract price. In the case of insurance contracts, mortgages and leases this will generally be at the time of contract; in the case of the purchase of an asset it will generally, depending on the terms of the contract, be the time of payment of the price.

Although it has been suggested that loss and damage for the purpose of s 82(2) may be different to loss or damage for the purpose of assessment, [21] the authorities do not draw such a distinction and usually the two dates will coincide, although the court may, within its discretion, assess loss on a different date, where the justice of the case demands.[22]

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17 *Nydredit Mortgage Bank Plc v Edward Erdman Group Ltd (No 2)* [1998] 1 All ER 305, 308 (actual damage is suffered at the time the transaction is completed by the plaintiff parting with their money and receiving property worth less in exchange). *Western Australia v Wardley Australia Ltd* (1991) 30 FCR 245, where Spender, Gummow and Lee JJ stated: "The applicant in such a case has suffered loss or damage forthwith upon completion of the sale". This statement was applied in *Pine River Pty Ltd v Scorda* [2001] WASC 105. Compare *HTW Valuers (Central Queensland) Pty Ltd v Astonland Pty Ltd* [2004] HCA 54, [15] (obiter).

18 This is consistent with statements in *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 528-532.

19 *Gates v City Mutual Assurance Society Ltd* (186) 160 CLR 1 (insurance contract: date of execution).

20 *Jobbins v Capel Court Corporation Ltd* (1989) 25 FCR 226 (investment in a film: entry into contract coincided with payment of money); *Forster v Outred & Co* [1982] 2 All ER 753 (mortgage: loss arose on execution of the mortgage not at time of enforcement by bank); *Gates v City Mutual Assurance Society Ltd* (1986) 160 CLR 1 (insurance contract: date of execution).

21 *Bullock v O'Sullivan* [2003] QDC (27 May 2003); (2004) Qld Lawyer Reps 198, [10].

22 For example*, HTW Valuers (Central Queensland) Pty Ltd v Astonland Pty Ltd* [2004] HCA 54; *Henville v Walker* (2001) 206 CLR 459.

3.2 When does the limitation period commence if loss is not reasonably ascertainable at date of contract?

According to the seminal decision of the High Court in *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 the time period under s 82(2) will commence at some future date when the "disadvantageous character or effect of the agreement [can] be ***ascertained*** and … its impact upon events as they unfold becomes known or apparent".[23] In that case the State of Western Australia sued Wardley for loss and damage allegedly suffered as a result of misleading and deceptive conduct on the part of Wardley, which led the State to grant an indemnity to the National Australia Bank against a bill facility granted to Rothwells Limited. By the indemnity the State agreed to indemnify the Bank against any net loss which might arise if Rothwells did not satisfy in full its liability under the bill facility. The Bank was subsequently called on to pay pursuant to the indemnity and a dispute was settled pursuant to which the State paid the Bank $10.5 million. The indemnity was executed on 26 October 1997. The State alleged that it had executed the indemnity as a result of misrepresentations that had occurred at a meeting on 24 October 1987. On 14 January 1991 the State amended its statement of claim to rely on additional representations made at a meeting on 25 October 1987. The primary Judge struck out the amendment on the grounds that it pleaded a cause of action outside the 3 year limitation period. The Full Court of the Federal Court allowed an appeal by the State. An appeal by Wardley against the Full Court decision was dismissed by the High Court.

The High Court held[24] that the indemnity generated an executory and contingent liability upon the part of the State and it suffered no loss until that contingency was fulfilled. The Court reasoned that where a plaintiff entered into a contract which exposed him or her to a contingent loss or liability, the plaintiff sustained no actual damage until the contingency was fulfilled and the loss became actual; until that happened the loss was prospective and may never be incurred.[25] The Court observed, without deciding, that an actual but deferred liability may stand in a different position.[26] Several observations of the High Court provide a basis for the more general principle (as developed by subsequent decisions) that until the applicant can reasonably ascertain that a loss was suffered as a result of the transaction, the time period will not commence. The instance of a contingent loss is merely one example of a situation in which loss is not ascertainable at the time of the transaction. The majority of the court relevantly observed that:

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[23] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 527.
[24] Ibid, 534.
[25] Ibid, 532.
[26] Ibid, 532.

> "When a plaintiff is induced by a misrepresentation to enter into an agreement which is, or proves to be, to his or her disadvantage, the plaintiff sustains a detriment in a general sense on entry into the agreement. That is because the agreement subjects the plaintiff to obligations and liabilities which exceed the value or worth of the rights and benefits which it confers upon the plaintiff. But, as will appear shortly, detriment in this general sense had not universally been equated with the legal concept of 'loss or damage'. And that is just as well. *In many instances the disadvantageous character or effect of the agreement cannot be ascertained until some future date when its impact upon events as they unfold becomes known or apparent and, by then, the relevant limitation period may have expired. To compel a plaintiff to institute proceedings before the existence of his or her loss is ascertained or ascertainable would be unjust.* Moreover, it would increase the possibility that the Courts would be forced to estimate damages on the basis of likelihood or probability instead of assessing damages by reference to established events. In such a situation, there would be an ever-present risk of undercompensation or overcompensation, the risk of the former being the greater."[27] (emphasis added)

One of the minority judges, Brennan J (as he then was), added:

> A transaction in which there are benefits and burdens results in loss or damage only if an adverse balance is struck. If the balance cannot be struck until certain events occur, no loss is suffered until those events occur. The quantification of the diminution in value of an asset or of a liability incurred or the value of any benefit acquired may not be ascertainable at the time when the burden of the transaction is borne. In that event, the suffering of any loss cannot be said to occur before it is reasonably ascertainable (*not* before it is ascertained) that the burdens which the plaintiff has borne are greater than the value of the benefits that the plaintiff has acquired or will acquire. In other words, no loss is suffered until it is reasonably ascertainable that, by bearing the burdens, the plaintiff is 'worse off than if he had not entered into the transaction'.[28]

Several clear principles emerge from their Honours' judgments:

(a) Although in the usual case loss is suffered at the time of entering a contract or purchasing an asset, there may be situations where it is not possible to ascertain that a loss has been suffered until some time in the future.

(b) A distinction should be drawn between loss which has occurred but has not been ascertained by the applicant (existing loss) and loss which is not capable of being ascertained until some time in the future (prospective loss). In the first instance the time period will commence at the time the loss is suffered whether this fact is known to the applicant or not.[29] In the second case the time period will commence at a time in the future when the loss is capable of being ascertained.

(c) One of the situations where loss is not capable of being ascertained at the time of contract is where the loss is contingent on the happening of a future event. It is clear from *Wardley* that in most cases indemnities and guarantees are contingent

[27] Ibid, 527 per Mason CJ and Deane, Gummow and McHugh JJ.
[28] Ibid 536-537, per Brennan J.
[29] This will generally be the case where a property purchased in reliance upon a misleading statement about its characteristics is actually worth less on the date of contract but this is not known to the buyer until a valuation is performed. See for example *Francis v Whatson* [1994] 2 Qd R 584; *Chapman v Luminis PtyLtd* (No 5) [2001] FCA 1106, [216] [218].

liabilities which may or may not be called upon by the relevant parties. Any loss prior to that time is contingent or prospective.

Several clear examples of contingent liability have emerged from the authorities. First, loss arising from an indemnity or guarantee will usually be suffered once obligations under the guarantee or indemnity crystallise.[30] Secondly, where a mortgage is entered in reliance upon a misleading valuation, loss is generally suffered by the mortgagee when the security does not realise the value represented.[31] Beyond these clear examples, the drawing of any clear principle becomes difficult. To an extent, any development of the principle is limited by its close relationship to the usual measure of damages applied by the court in respect of the particular transaction. The limitations represented by this linkage are best exemplified in the case of the purchase of an asset in reliance upon misleading conduct. A court (subject to valuation evidence) will usually accept that loss is suffered at the time the asset is purchased,[32] particularly where the claimant seeks the usual measure of loss as represented by the difference between the contract price and the market value of the property. The loss will be suffered and the cause of action will accrue at the time of acquisition even though the extent of the loss may not be known or ascertained by the applicant. This has led to Judges distinguishing between the mere sale and purchase of a property and other types of transactions.[33] There are a number of authorities which have accepted that transactions involving the sale of a business,[34] entry into the lease of a business,[35] purchase of a unit with a requirement to lease back to the seller for a period of years[36] and the purchase of land for rezoning, subdivision and sale induced by misleading statements of a financier[37] fall outside this general principle. It is instructive to analyse the reasoning behind several of these decisions to establish if they are merely further instances of contingent loss or the recognition of new situations in which loss is not ascertainable until sometime after the date of contract.

4. Reasonably ascertainable loss in sale of business cases

4.1 Ascertaining Loss where Misleading Conduct about Future Takings

Transactions involving misleading conduct about the takings of businesses have provided fertile ground for discussion of the concept of reasonably ascertainable loss. Shortly after the

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30 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514; *Wardman v Hatfield* [2003] NSWCA 283 where the guarantee crystallised upon default by the lessee in payment of rent as no other preconditions to a claim by the lessor existed in the guarantee.

31 *MGICA (1992) Ltd (formerly MGICA Ltd) v Kenny & Good Pty Ltd* (1996) 140 ALR 313, 375-377 (FCA).

32 *Reiffel v ACN 075 839 226 Ltd* (2003) 45 ASCR 67.

33 See for example *Bullock v O'Sullivan* [2003] QDC 155; (2004) Qld Lawyer Reps 198, [21] per McGill DCJ.

34 *Blacker v National Australian Bank Ltd* [2001] FCA 254.

35 *Karedis Enterprises Pty Ltd v Antoniou* (1995) 59 FCR 35.

36 *Bullock v O'Sullivan* [2003] QDC 155; (2004) Qld Lawyer Reps 198.

37 *Pace v Westpac Banking Corporation* [2002] QCA 350.

High Court's decision in *Wardley*, the Full Federal Court in *Karedis Enterprises Pty Ltd v Antoniou* (1995) 59 FCR 35 adopted the High Court's reasoning in the case of a sale of a business induced by misleading conduct. The tenants of retail premises were induced to enter into a lease of the premises (from which they intended to operate a coffee lounge) by the landlord's misrepresentations about the likely takings from the business. On 14 October 1988, the lease was executed. In December 1988, the coffee lounge opened and in February of 1991 the coffee lounge closed. In November 1992 proceedings were commenced by the tenants for damages pursuant to s 82 of the TPA. This was more than 3 years after the lease had been entered into by the parties. The trial judge rejected a limitation defence pursuant to s 82(2) finding that it was not until at least one year after the tenants commenced business that trading had settled into a pattern demonstrating that the tenants were suffering losses as a result of the representations made by the landlord. This would have placed the timing of loss at December 1999 which was within the 3 year period. The Full Court allowed an appeal by the landlord and remitted the matter to the trial judge to ascertain the time at which it could be said that it was reasonably ascertainable that the tenants would suffer loss.

It was said by Burchett and Hill JJ:

> The present is a case where the mere entry into the lease produced only a situation where the [tenants] had the potential to suffer loss. That loss could only be calculated by reference to receipts and outgoings of the business over time. Certainly it could not be said at the time the lease was entered into that they had actually incurred loss or damage as distinct from potential or likely damage. [38]

Their Honours further said:

> <u>The question for determination in a case such as the present</u>, consistent with the views expressed by their Honours in the High Court in *Wardley*, <u>will be when was it that the loss which the [tenants] ultimately suffered (or a more than negligible part of it) was either ascertained by them or reasonably ascertainable?</u> No question in the present case arises as to the point of time at which the loss was in fact ascertained. <u>Essentially therefore the question was an objective one, namely, at what time could it be said that it was reasonably ascertainable that the [tenants] would suffer loss.</u> This was a question of fact to be determined by reference to the trading figures of the cafe business.[39] (underlining added)

The Full Court's reasoning in *Karedis* has been adopted consistently in subsequent cases concerning the sale of a business induced by misleading conduct about the likely takings of the business.[40] The common thread emerging from these decisions is that the issue of whether a business is capable of producing a certain turnover is not usually known at the

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[38] Ibid, 42.

[39] Ibid, 43.

[40] *Australian Competition and Consumer Commission v Pacific Dunlop Limited* [2001] FCA 740 at [39]; *Pace v Westpac Banking Corporation* [2002] QCA 350 at [58]-[60]; *Troulis & Anor v Vamvoukakis* (unreported, New South Wales Court of Appeal, 27 February 1998); *Airberg Pty Ltd & Ors v Cut Price Deli Pty Ltd* [1998] FCA 893; *Blacker v National Australia Bank Ltd* [2001] FCA 254.

time of contract and the cause of action (to recover trading losses) does not arise until it becomes apparent the business is not capable of producing the particular return.[41] It follows from this that a cause of action will not arise until the falsity of the statement about takings and the consequential loss is ascertainable. In the writers' view, this situation appears to mirror the approach to contingencies adopted by the High Court in *Wardley*.

4.2 Loss of capital value and trading losses – Can the limitation periods differ?

Where valuation evidence reveals that the business or property was not worth what was paid and trading losses are suffered, will the limitation period for the capital loss and the trading losses commence at different times? General principle clearly provides that where an applicant seeks damages as the difference between the contract price and the market value of the property at the date of contract, the time period under s 82(2) commences at that time.[42] This position will prevail even where it is necessary for the court to have regard to subsequent events as they unfold to ascertain the true value of the property at the date of contract. In that case, it is only the *assessment* of that loss which may depend upon the future events and not the incurring of the loss.[43] This should be distinguished from the situation of additional loss, usually in the form of trading losses, which cannot be ascertained until some time in the future. If a claim for the loss of capital value is time barred, will the consequential trading losses also be barred?

The possibility of different time periods being applied to consequential loss is alluded to in *Blacker v National Australia Bank* [2001] FCA 254, a case in which the appellants were induced to purchase a dairy farm and associated assets by reason of misrepresentations made by a branch manager of the respondent bank who predicted a positive cash flow in the first two years of operation. The bank had no reasonable grounds for making the predictions as to future revenue from the business. The purchase of the dairy business was completed on 23 September 1993. Proceedings were instituted on 27 November 1997 claiming trading losses. The primary judge held that by May 1994, or at least by August 1994, the appellants could reasonably have ascertained that they had already suffered more than negligible loss as a result of operating the dairy business. This finding was upheld by the Full Federal Court and the claim dismissed as being out of time. In the course of their Honour's judgment, the

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41 *Troulis & Anor v Vamvoukakis* (unreported New South Wales Court of Appeal 27 February 1998) p11; *Airberg Pty Ltd & Ors v Cut Price Deli Pty Ltd* [1998] FCA 893, [52] – [53].

42 *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1988] 1 All ER 305, 308; *Western Australia v Wardley Australia Ltd* (1991) 30 CLR 245, 261 where Spender Gummow and Lee JJ stated "The applicant in such a case has suffered loss or damage forthwith upon completion of the sale" applied in *Pine River Pty Ltd v Scorda* [2001] WASC 105.

43 Refer to *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281, 291-294; *HTW Valuers (Central Queensland) Pty Ltd v Astonland Pty Ltd* [2004] HCA 54, 29] – [30].

Court suggested that two types of loss may be available in the case of the purchase of a business:

> In the case of the purchase of a business induced by the misleading conduct of the vendor or a third party, losses may be suffered independently of the viability of the business or the recoverability of any trading losses. The obvious case is where the value of the business is less than the price paid by the applicant: see *Potts v Miller* (1940) 64 CLR 282, at 289-290; *Gould v Vaggelas* (1985) 157 CLR 215, at 220, per Gibbs CJ. But the purchaser of a business may be entitled to recover so-called 'consequential losses' such as trading losses: *Gould v Vaggelas*, at 220-224, per Gibbs CJ; at 242-243 per Wilson J; at 255-256, per Brennan J (a case of deceit). Again, the question of when the consequential losses (or more than a negligible part of those losses) were suffered is one of fact. *The answer is not necessarily coincidental with the date on which it becomes manifest that the business will not be viable or the losses irrecoverable*.[44] (emphasis added)

In the writers' view, trading losses may be considered as a different type of loss recoverable even if a capital loss is not proven or has not resulted from the misleading conduct.[45] In *Kalgoorlie Consolidated Gold Mines Pty Ltd & Ors v F L Smidth Inc* [2003] WASC 52, Hasluck J observed that it was not inconsistent with the language of s 82 that where conduct causes several discrete losses which occur at different times that the right to recover the amount of each loss accrues only when the particular loss occurs.[46]

Further support for this proposition can be gleaned from several statements in *Murphy v Overton Investments Pty Ltd* (2004) 204 ALR 26. In 1992 the appellants entered into a lease (of a unit) in a retirement village in reliance on various representations including a representation about the level of contributions that were required to be made. The respondent provided an estimate of outgoings that did not reflect the actual cost of outgoings nor did it take into account all of the types of outgoings that the respondent was entitled to recover under the lease. In 1997 the respondent commenced charging for all outgoings as they were entitled to do so under the lease. In the course of the High Court's reasoning a question arose as to the treatment of different types of loss arising from the same misleading conduct arose. The High Court was unanimously of the view that different forms of loss could be incurred at different times. Although there was no evidence the value of the lease was less than the consideration paid, the High Court considered that if this contention had succeeded:

> ..it would not necessarily follow that all of the appellants' claims were statue barred. That is because while ss 82(1) and 87(1) may prevent an applicant from suing for some items of loss or damage, they may leave open the possibility of recovering others even though all items of loss or damage arose from a single piece of contravening conduct.[47]

44 Ibid [74].
45 This is clear from *Gould v Vaggelas* (1985) 157 CLR 215, 221-222 per Gibbs CJ.
46 Ibid [33].
47 Ibid [56].

Although the validity of such a principle was not debated fully before the High Court, in the writers' view the principle is sustainable particularly in light of the fact that trading losses may be recoverable where no capital loss is sustained. In principle, the validity of a claim for trading or consequential loss should not be preconditioned on the existence of a capital loss. Therefore, it is possible to view capital loss and consequential loss as separately recoverable. This is consistent with the general approach that the question of whether loss is one of fact to be determined having regard to the interest infringed.[48] Where separate interests are infringed or different types of loss occur, the time at which loss is sustained may differ. Merely because money is paid for the acquisition of an asset does not mean loss is automatically suffered at that time.

5. Contingencies within the control of the wrongdoer

To this point the types of contingent loss examined in this article may be described as losses contingent on the happening of an event outside the control of the wrongdoer. Whether trading losses will be suffered by the purchaser of a business may depend upon a variety of factors including economic constraints, the business aptitude of the purchaser and competition.[49] Rarely will the wrongdoer have any control over events once a business is sold. Likewise, whether a guarantor will comply with the terms of the guarantee or indemnity is not usually something the wrongdoer can control. *Wardley* draws no distinction between contingencies arising from external events and those within the control of the wrongdoer. The cases which have given rise to a consideration of contingencies within the control of the wrongdoer have several common features; there is an on-going contractual relationship between the parties, the wrongdoer exercises some discretion within the terms of the contract and the exercise of the discretion reveals to the applicant the misleading nature of statements made by the wrongdoer at the time of entry into the contract.

Clearly where the exercise of a contractual right by the wrongdoer crystallises a contingent or prospective loss *Wardley* will apply. This was made clear by the High Court in *Marks v GIO Australia Holdings Limited* (1998) 196 CLR 494 where Gummow J stated:

> No doubt the contravention of s.52 occurred before entry by the borrowers into their respective contracts. But any injury which would found their actions under s.82, and for which it would provide a measure of compensation, was contingent or prospective until GIO acted to increase the margin rate and that increase became legally binding upon the borrowers to expand what previously had been their contractual liabilities to GIO. It follows that, on any

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48 *Karedis Enterprises Pty Ltd v Antoniou* (1995) 59 FCR 35 at 40-43; *Blacker v National Australia Bank Ltd* (2001) ATPR 41-817 at 42,968; *Kalgoorlie Consolidated Gold Mines Pty Ltd & Ors v F L Smidth Inc* [2003] WASC 52.

49 See, for example, *Collins Marrickville Pty Ltd v Henjo* (1987) 72 ALR 601; *Great Australian Bite Pty Ltd v Menmel Pty Ltd* (1996) ATPR 41-506.

footing, the expanded liabilities would not have crystallised until 1 August 1992 when the increased 2.25 per cent became effective.[50]

Two significant issues arising from a situation where the wrongdoer can decide the timing of a contingency require further consideration:

(a) What is the position where loss (in the form of a loss of capital value) is sustained at the time of entry into a contract but the misleading nature of pre-contractual statements (and, therefore, the existence of any loss) is hidden until the wrongdoer's contractual right or discretion is exercised?

(b) Where a wrongdoer actively conceals the existence of a loss of value from the applicant through fraudulent or illegal conduct, when does the limitation period under the TPA commence?

5.1 Exercise of contractual right or discretion reveals existence of misleading conduct and loss

It appears from the authorities that whether the conduct of the wrongdoer will impact on the commencement of a limitation period will be answered by the evidence presented by the applicant and the measure of loss sought. An applicant who seeks loss as comprising the difference between the contract price and the market value at the date of contract and produces valuation evidence to that effect is asserting the existence of actual loss at the date of contract. In the face of this type of evidence the court may decide, as the High Court did in *HTW Valuers (Central Queensland) Pty Ltd v Astonland Pty Ltd* [2004] HCA 54, that the impact of the wrongdoer's contractual discretion or, as in that case, external competition, was known at the time of contract and subsequent events merely clarified the amount of loss and not its existence.[51] Can an applicant avoid the result in *HTW Valuers* by pleading his or her loss in a different way? Several decisions are instructive of the approach that may be taken by a court.

First, in *Bullock v O'Sullivan* [2003] QDC 155; (2004) Qld Lawyer Reps 198 a defendant applied for summary judgment (or in the alternative, sought to strike out the plaintiff's statement of claim) on the ground that it was time barred pursuant to s 82(2) of the TPA. The plaintiff's case was that on or about 9 February 1996 he contracted to purchase a unit in a proposed building known as the All Seasons Village Resort for a price of $72,900.00. It was a requirement of the contract that the plaintiff enter into a lease of the unit to a company for a period of 10 years on certain terms and conditions. It was further alleged that the contract

50 Ibid at [105].

51 This is consistent with the rule in *Potts v Miller* (1940) 64 CLR 282.

was entered into in reliance on a variety of representations including a representation that investment in the unit would result in a 9.75% net return for the plaintiff in the first year of purchase increasing over a 10 year period by CPI each year and that such return was guaranteed for 10 years with 3 further 10 year options. The action was commenced on 30 March 2001 when the defendant failed to honour the guarantee.

After careful consideration of the authorities[52], McGill DCJ concluded that arguably the claim was not time barred and the matter should be resolved at trial. One of the significant reasons for his Honour's conclusion was the fact the transaction was more than the purchase of an asset in the conventional sense; it was a stream of income.[53] His Honour explained this conclusion in the following way:

> In these circumstances, even if there are misleading or deceptive statements about it, it is difficult to see how any actual loss is suffered unless and until the stream of income falls below what has been represented, indeed falls below it to the point where it can be seen that it was not worth what was paid for it. That is something which was not necessarily the case at the time when the contract was settled. Even if there were misleading statements made as to the terms of the transaction, it did not necessarily follow that any actual loss would be suffered. In the same way, even if representations as to future matters were made without any reasonable basis, it did not necessarily follow that any loss would be suffered. That depended on what happened subsequently: the development might have been highly successful, and generated returns which satisfied the plaintiff, or at least justified the purchase price. The purchaser only suffered loss, or only suffered ascertainable loss, at a time when it became reasonably apparent that that was not going to happen.[54]

The opportunity to consider the implications of a contingency within the control of the wrongdoer was also raised by the facts of *Murphy v Overton Investments Pty Ltd* (2001) 112 FCR 182 (FC); (2004) 204 CLR 26 (HC). As previously discussed, the appellants had entered into a lease (of a unit) in a retirement village in 1992, in reliance on various representations, including a representation about the level of contributions that were required to be made. The respondent provided an estimate of outgoings that did not reflect the actual cost of outgoings nor did it take into account all of the types of outgoings that the respondent was entitled to recover under the lease. In 1997 the respondent commenced charging for all outgoings as they were entitled to do so under the lease. The claim for overpayment of outgoings was commenced more than 3 years after the lease commenced.

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52 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514; *Jobbins v Capel Court Corporation Ltd* (1989) 25 FCR 226; *Karedis Enterprises Pty Ltd v Antoniou* (1995) 59 FCR 35; *Troulis v Vamvoukakis* (unreported New South Wales Court of Appeal 27 February 1998); *Blacker v National Australia Bank Ltd* [2001] FCA 254; *Murphy v Overton Investments Pty Ltd* (2001) 112 FCR 182 (FC).

53 [2003] QDC 155; (2004) Qld Lawyer Reps 198, [21].

54 Ibid.

In the Full Federal Court only Gyles J considered the claim under the TPA was not statue barred. Gyles J held that the trial judge was wrong in finding that any loss or damage which was suffered occurred upon entry into the lease.

> In my opinion, operation of cl 5 of the Lease Memorandum depended upon a decision by the lessor to levy on a full recovery basis, not upon the existence of an underlying state of facts which existed at the time of the transactions, as in the classic *Potts v Miller* case. Clause 5 imposed an inchoate obligation which was only translated into operation by the act of the lessor in levying contributions.[55]

On appeal, the High Court favoured the broader approach of Gyles J, endorsing the principle that whether loss and damage has been sustained depends on the broad question of 'how much worse off' is the aggrieved party as a result of the conduct. The High Court reached the conclusion that the appellant's loss did not come to pass until a contingency, in the form of the decision by the respondent to charge a greater proportion of outgoings, occurred. When asking the question 'how worse off' was the applicant, the detriment identified by the evidence was an obligation to pay an increased amount of outgoings. The evidence did not reveal a diminution in value at the time of contract. The Court's conclusion that the loss in relation to the outgoings was contingent only until the increased outgoings were levied is expressed as follows:

> What the appellants did not know was that the estimate of outgoings they were given did not provide for all the outgoings that were then being incurred. Here therefore, the appellants suffered no loss as a result of undertaking the obligations they did unless and until the contingency which the misrepresentation hid (that items other than those used to form the estimate were then being incurred and could be changed as outgoings) was first realised. That was a contingency in the sense that the adverse risk might never have eventuated. …
> It was only from the time when it in fact decided to depart from the 1992 position and charge for the wider categories that the adverse risk eventuated. When it did, but only then, the appellants suffered loss and damage.[56]

These conclusions should be read in light of the fact that no evidence was presented by the respondent that the lease was actually worth less on the date of contract.[57] If evidence to this effect was produced, it is the writiers' view that a claim for the difference in value on the date of contract would have been statute barred even though other loss in the form of additional outgoings was not.[58] Whether the fact the loss was only revealed by the respondent exercising its discretion was not raised by the applicant.

55 (2001) 112 FCR 182, [134].
56 [2004] HCA 3, [55].
57 Likewise, in *Bullock v O'Sullivan* [2003] QDC 155; (2004) Qld Lawyer Reps 198, no evidence was led at the application that the unit was worth less than the contract price at the date of contract or completion.
58 [2004] HCA 4, [56].

This view is supported by the subsequent decision of the High Court in *HTW Valuers (Central Queensland) Pty Ltd v Astonland Pty Ltd* [2004] HCA 54 where the Court distinguished the facts before them from *Murphy* on the basis that:

> unlike the contingency in *Murphy v Overton Investments Pty Ltd*, [the impact of the proposed shopping centre] was not *hidden and did not rest on any discretionary decision by anyone'*. (italics added)

This statement refers to the fact that the existence of the particular loss claimed in *Murphy*, being the loss of outgoings, was dependent upon a future decision by the defendant. It is unlikely that the reference to 'hidden' loss signals a willingness by the court to extend time where actual loss occurs on the date of contract but is hidden and only revealed by the exercise of the defendant's discretion. That situation is analogous to the position in *HTW Valuers* where the impact of the future shopping centre was already known in the market place, but the extent of the impact was unclear. The High Court took the opportunity in *HTW Valuers* to disapprove of the use of the principle of unascertainable loss in this type of situation. On the basis of this decision the fact a defendant may wait to exercise their discretion until after the limitation period has expired, is unlikely to make a difference if the evidence reveals an actual loss of capital value on the date of contract. In that case the loss of value is capable of being ascertained by a valuer as at the date of contract, it is merely the extent of the loss that is revealed by the exercise of the discretion.

5.2 Actual loss concealed by fraud or illegal conduct of the wrongdoer

The appellant in *Murphy* did not raise for consideration whether the respondent should have been prevented from relying on a limitation defence where the respondent's own conduct had concealed the fact loss had been suffered.

Should a wrongdoer who has engaged in collusive, fraudulent or illegal conduct with the intention of concealing a loss from the applicant be able to rely on a limitation defence? Although it has been suggested that it would be "contrary to basic principle to deprive an injured party of its right to compensation arising out of a fraudulent conspiracy merely because the conspiracy was not detected until after the limitation period had expired",[59] s 82(2) of the TPA, unlike the State *Limitation Acts*, does not contain any express exception for fraud.[60]

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59 *Energex Limited v Alstom Australia Limited* [2004] FCA 575, [169].

60 *Limitation Act 1985* (ACT), s 33; *Limitation Act 1969* (NSW), s 55; *Limitation of Actions Act 1974* (Qld), s 38; *Limitation of Actions Act 1936* (SA), ss 25, 48; *Limitation Act 1974* (Tas), s 32; *Limitation of Actions Act 1958* (Vic), s 27; *Limitation Act 1935* (WA), s 27; *Limitation Act 1981* (NT), s 42.

The question that arises is whether the principle in *Wardley* will apply where, although the loss is not contingent, it is not possible to ascertain a loss has been suffered until the fraud is discovered. This has some analogy to loss arising from a defective building where it is accepted that loss is only sustained when the defect is discovered or discoverable.[61]

The issue arose for consideration in *Energex Limited v Alstom Australia Ltd* [2004] FCA 575; (2004) ATPR (Digest) 46-251[62] where Energex purchased a transformer from the respondent at an overvalue. The fact the transformer was not worth what was paid did not come to light until the existence of a collusive tendering arrangement in breach of s 45 of the TPA was discovered. By this time it was more than 3 years from the time the contract had been entered into. Counsel for Energex argued that:

> just like the person who buys the building with the latent defects that one day will emerge into cracks that devalue it, we acquired transformers in the market in circumstances in which the day after we acquired them, just like the building with the canker working away at its foundations, our transformer was worth exactly what we paid for it the day before and remained so, and remained so until the fact of the cartel and the fact that the market was rigged emerged.[63]

Energex can be distinguished from *HTW Valuers* where the impact of the new shopping centre was already known to the market at the time of contract and the loss was ascertainable. In contrast, any valuation of the transformer in the *Energex case* either at the time of contract or afterwards would not give rise to the true market value, a fact which was only capable of ascertainment after the collusive arrangement was discovered. This found favour with the Weinberg J who considered that while the analogy with latent defects in buildings and the contingent liability cases (such as *Wardley*) was not exact,

> it hardly lies in the mouth of those who have engaged in serious and persistent misconduct to say that, having managed to keep their nefarious deeds secret for a sufficiently long time, they are entitled to take the benefit of a limitation defence. The miscreants, having by their conspiracy not merely injured Energex, but also prevented it from discovering what was happening, should not be permitted to take advantage of their own misconduct. [64]
>
> … There is no doubt in my mind that a person who buys what he or she is told is a famous painting, but is in fact a forgery, should be able to recover damages from the fraudulent vendor, provided proceedings are brought within the relevant limitation period once the fraud has been discovered. The question is whether it requires legislation to produce this result, or whether there is some other way in which it can be achieved. [65]

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61 *Bryan v Maloney* (1995) 182 CLR 609; *Hawkins v Clayton* (1988) 164 CLR 539, 587-588; *Scarcella v Lettice* (2000) 51 NSWLR 302*; Sherson & Associates Pty Ltd v Bailey* (2001) Aust Torts Reports 81-591.

62 Whilst this was a strike out application the court gave detailed consideration to the argument based upon fraud.

63 Ibid [176].

64 Ibid [193].

65 Ibid [194].

> …. It is unnecessary, at the present stage, to come to any firm conclusion about this matter. It is sufficient to say, as I have done, that it is arguable that in cases where what is claimed is economic loss arising from the purchase of an asset, no loss is suffered until there has been an actual balancing of benefits and burdens, leading to the conclusion that loss has been incurred. Alternatively, no loss is suffered until it becomes possible to ascertain that an adverse balance has been struck. [66]

The validity of this argument relies upon a broad interpretation of *Wardley* and an acceptance that 'ascertainable loss' is more than merely contingent loss. For the situation in *Energex* to fit within the conceptual framework of *Wardley*, it is necessary for ascertainable loss to be loss the existence of which, as opposed to the amount, is capable of being ascertained by reference to information which is readily available or could be discovered upon a reasonable inquiry by the applicant. Such an interpretation would take into account the reality that where the existence of loss is concealed by fraud, the loss is actually 'hidden' and depends upon the contingency of discovering the fraud before it can be ascertained that the applicant has actually suffered a loss. It follows that if the loss is never discovered and the asset disposed of without knowledge of the loss, no cause of action could arise. Although this conclusion appears to coincide with the policy espoused in *Wardley*, the doubts raised by the learned primary Judge in *Energex* and the lack of a specific exception in the legislation may result in the strict letter of the legislation being followed (with the consequence that the cause of action is not postponed until discovery of the true value).

6. Ascertainable loss where land acquired for development

The final type of dealing that requires examination is a contract for the sale of property where the applicant intends to develop the property and sell the product of that development. What is the loss arising if the misleading conduct relates to the potential profit to be made? When does that loss arise?

As stated by the High Court in *Murphy,* it is necessary to identify the detriment which has occurred as a result of the misleading conduct.[67] Once this detriment is identified it is a question of discovering when it first occurred. Where the misleading conduct concerns the potential profit to be made from developing land, it is arguable that the loss is not sustained at the time of contract, as the undeveloped land is usually worth what the developer has paid for it. The loss usually becomes evident at the time the developer endeavours to sell the property with the improvements constructed on the land. For example, in *Henville v Walker* (2001) 206 CLR 459 the plaintiff successfully claimed damages under s 82 of the TPA comprising the cost of purchase and development less the sale price of the developed units

[66] Ibid [195].
[67] Ibid [46].

which was quantified as $319,846. The plaintiff purchased the property in reliance upon the representations of an agent about the sale price of units which could be developed on the property. Although time limitation periods were not an issue in the case, the measure of loss suggests that the plaintiff's cause of action did not accrue at the time of the purchase, but only accrued at a point in time when it was obvious the unit could not be sold for the price represented.

Similarly, *Manwelland Pty Ltd v Dames & Moore Pty Ltd* [2001] QCA 436 involved a similar claim under s 82 of the TPA where the contract of sale was induced by the misleading advice of a company with expertise in remediation of land. After purchasing the property, the plaintiff discovered that the extent and cost of the remediation necessary to be able to develop it was significantly more than stated by the defendant.[68] Despite this difference, the plaintiff continued with part of the development and sold a portion of the property. The plaintiff claimed damages under s 82 of the TPA quantified as the difference between the contract price of $810,000 and the value of the property at the date of contract. The Court of Appeal rejected the claimed quantification and instead assessed the loss by comparing the position the plaintiffs were in after the project was finished and the position they would have been had they not undertaken the project at all. The court justified this approach by reference to statements in *Henville v Walker* (2001) 206 CLR 459 and *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1. Again, this would suggest that the cause of action did not arise until a later date than the contract date as it was not until the income to be derived from the project could be quantified that it was possible to ascertain if a loss was incurred. Until that point in time, the project could have made a profit.

This approach could be placed within the principles discussed in *Wardley* on the basis that until the income from the development is actually ascertainable it is not possible to ascertain the "disadvantageous character or effect of the agreement".[69] In other words, until all the benefits and burdens of the transaction are fully ascertained it is not possible to conclude a loss has actually occurred. The approaches to the assessment of loss in *Henville v Walker* (2001) 206 CLR 459 and *Manwelland Pty Ltd v Dames & Moore Pty Ltd* [2001] QCA 436 may provide further instances of actual loss not being suffered at the date of transaction.

7. Conclusion

[68] In a report the respondent claimed that it would cost $25,000 whereas the actual cost was approximately $300,000.

[69] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 527

The authorities following *Wardley* reveal that the ambit of the concept of 'ascertainable loss' or ‘loss capable of being ascertained' remains open for debate. In straightforward situations, such as the sale of an asset, it is clear that loss is suffered upon acquisition of the asset. Alternatively, where a purely contingent liability is incurred the loss is not suffered until the contingency occurs. Other situations present particular difficulties for the courts. In the writers’ view, cases that have applied the principle of ascertainable loss to losses which are not readily identifiable as 'contingent'[70] can only be justified if 'ascertainable loss' (rather than ‘contingent loss’) is adopted as the conceptual framework for ascertaining when the relevant limitation period commences.

In developing the concept of ascertainable loss, various relevant factors have emerged from the existing authorities. The first factor is the nature of the transaction entered into by the aggrieved party. The purchase of an asset, such as a house, which is worth less than the buyer paid for it, will not be susceptible to an application of the concept of reasonably ascertainable loss. Generally this due to the fact that the house will be worth less on the date of acquisition than the buyer paid for it. On the other hand, the purchase of a business or the entry into a lease, mortgage or contract of indemnity may not necessarily result in loss to the applicant at the time of entry into the transaction as the disadvantageous nature of the transaction may not be ascertainable until the business has operated for a period of time.

Secondly, the nature of the misleading conduct should be considered. Where a business is purchased and representations made to the buyer about the takings both present and future, it may not be until the takings fall below the represented amount that a party could reasonably be said to ascertain that a loss has been sustained. This was the view taken by the Federal Court in both *Karedis* and *Blacker*. In those cases, there was only a risk of a loss occurring at the time of contract in the sense that the loss of takings may never have eventuated.

Thirdly, the type of loss claimed by the applicant and the approach to assessment of damages by the Court will impact on the Court’s assessment of the commencement of the limitation period. An applicant seeking damages comprising, inter alia, the difference between the value of the business at the date of completion and the contract price invites the Court to conclude that at least the capital loss was suffered at the time of acquisition of the business.[71] The same could be said of the purchase of a unit in a scheme where

70 Particularly decisions such as *Henville v Walker* (2001) 206 CLR 459; *Bullock v O'Sullivan* [2003] QDC 155; (2004) Qld Lawyer Reps 198.

71 Loss was assessed on this basis in *Kizbeau Pty Ltd v WG&B Pty Ltd* (1995) 184 CLR 281.

representations are made about the guaranteed level of income from renting the unit.[72] A claim for the diminution in value of the unit would suggest that it was the purchase of an asset that was not worth what was paid for it at the time.

There is one category of case which does not fit neatly within the concept of ascertainable loss and that is where *actual* loss has been suffered but the *existence* of such loss has been concealed by the fraud (or unconscionable conduct) of the wrongdoer. It is clear from decisions such as *Murphy v Overton* [2004] HCA 54 that if valuation evidence at the time of contract establishes that a loss has occurred, the current drafting of s 82(2) does not provide sufficient scope for a court to exercise its discretion concerning commencement of the limitation period. While justice would dictate that the wrongdoer not be permitted to rely upon a limitation period in such circumstances, it is the writers' view that where actual loss has been suffered a court could justifiably conclude that the limitation period commences notwithstanding the concealment by the wrongdoer. Alternatively, if it is accepted that ‘ascertainable loss’ is loss the existence of which (as opposed to the amount) is capable of being ascertained by reference to information which is readily available or could be discovered upon a reasonable inquiry by the applicant, a different result may eventuate. Although the writers are of the view that this alternative argument is not without merit, clarity on this issue may only be achieved by amendment of the TPA to include an express exception for, at least, fraudulent concealment of loss resulting from misleading or deceptive conduct.

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[72] See *Bullock v O’Sullivan* [2003] QDC 155; (2004) Qld Lawyer Reps 198.